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No. 1047

In the

Supreme Court of the United States

OCTOBER TERM, 1967

THE NATIONAL INSIDER, INC.,
Petitioner,

vs.

BEST MEDIUM PUBLISHING CO., INC.,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Faced with the difficult task of having to uphold an indefensible judgment, respondent has sought to cast doubt upon petitioner's statement of the case in its petition for certiorari and, in the process, has done what it accuses petitioner of doing,—it has misstated the facts. This is shown on page 2 of its brief, where it accuses petitioner of failing to comply with Supreme Court Rule 40(e). Even a cursory reading of this rule shows that it does not apply to the present situation, but only to "briefs of an appellant or petitioner on the merits."

The central and most important misstatement by respondent is that "the basic underlying argument on which petitioner relies to reverse this judgment is that the trial court misconstrued the evidence." (Br. 5) Nothing could be further from the truth. Petitioner does not here challenge the findings of fact of the trial court, only the rulings of law which are applied to these findings. The trial court's ruling, affirmed by the Court of Appeals, was not based upon its findings of fact, but in spite of them. The improper result was based upon a specious rule of law which has no support in the cases or in fact. It was one supposedly drawn from treatise writers:

> "The court concludes that where no conditions are stated at the time of the sale of an article, the law implies that there is a complete sale of the article and the publisher has full rights thereto.
>
> "It would seem to be the law as established by the treatises that where an author sells an article to a periodical without specification of the rights he is conveying that he transfers his entire right to the publisher who has the right to copyright thereon." (Supp. App. 3)

What is more, the authorities cited by the District Court in support of this proposition do not apply to the admitted facts of this case. "Magazine Rights—A Division of Indivisible Copyright," 40 Cornell Law Quarterly, 411, 438 states:

> "*In the absence of evidence to the contrary,* the transfer by an author to a magazine publisher of a manuscript without restriction is deemed to carry with it all right, title, and interest, including all rights of copyright, therein." (Supp.App. 3) (emphasis added)

Here there was much evidence to the contrary, found by the trial court, which it overrode by this supposed rule.

In *Lin-Brook Builders Hardware* v. *Gertler*, 352 F.2d 298, 300 (9th Cir. 1965), the only case cited to support its proposition, the court says that in the situation where the author is engaged by the publisher to produce a work, "the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done." (Supp.App. 4) Here, we are dealing with free-lance writers who have written the articles on their own, not those commissioned by the publisher to do work for it. This case has no relevance to the one at bar.

This major point was not even mentioned in the opinion of the Court of Appeals. This is a misstatement of an important rule of law as far as copyright issues are concerned, one wholly inconsistent with the constitutional protection of authors and should be reviewed by this Court for the reasons set out in the Petition for Certiorari. This is the keystone of the entire decision by the trial court. If his ruling on this point falls, as we believe it should, the entire basis of his decision is undercut. Not alone petitioner but all authors and publishers will feel the adverse effect of the erroneous ruling.

In this same vein, while pages 10-13 of the Petition for Certiorari did discuss the evidence introduced below, it was to point up the failure of the trial court and the Court of Appeals to follow another well-known rule of law which they both ignored, *i.e.*, that where a party fails to produce evidence in his control it will be presumed that such evidence is favorable to his opponent. It is

uncontradicted that the rights purchased by a publisher are frequently stated upon the manuscript submitted to the publisher by the author, and that respondent failed to produce even one such manuscript. In its "Correction of Misstatements" respondent contends that it produced "uncontradicted testimony of plaintiff's editor that all manuscripts were routinely destroyed after six months and a microfilm copy retained." (Br. 3) This is no explanation, but only an excuse, which shows that respondent destroyed the one item of evidence which could conceivably prove the claim which it asserts. How does this indicate that the destroyed evidence would not be favorable to petitioner? On the contrary, the inference is unmistakable that if the manuscripts did in fact support respondent's claim that it had purchased all rights to the articles, they would not be destroyed, but would be kept for just such a contingency as they allege occurred here.

The other point raised by petitioner's discussion of the evidence before the trial court is that despite his finding that petitioner's "evidence supported its contention that there is an established custom and usage that free lance authors selling to a tabloid sell only first rights," the trial court based its decision upon the spurious rule of law drawn from treatise writers as discussed above. Petitioner is not requesting this Court to review the evidence herein, but to require that the correct rules of law be applied thereto.

Respondent attempts to show with respect to the Hollywood material involved in four of the counts, that there is no dispute among the circuits concerning the originality requirement of copyright. Such attempt is indeed frivolous. The Seventh Circuit has held that this originality

requirement means nothing more than a prohibition of actual word for word copying. (Petition for Certiorari, p. 19) Numerous cases in other circuits have held exactly to the contrary. Copyrighted work based on material in the public domain can be infringed only when so transformed by the first taker as to entitle him to a claim of originality, and not merely the pretense thereto. *Greenbie* v. *Noble,* 151 F.Supp. 45, 65 (S.D.N.Y. 1957). Originality means that "the author has created it by his own skill, labor and judgment." *Gordon* v. *Weir,* 111 F. Supp. 117, 123 (E.D.Mich. 1953), *aff'd* 216 F.2d 508. It is not simply a matter of using paste pot and shears, or stringing together a bunch of press releases. The statements of the court in *Chamberlin* v. *Uris Sales Corp.,* 150 F.2d 512, 513 (2d Cir. 1945), quoted at page 19 of the Petition for Certiorari, are directly contrary to the holding in this and the other Seventh Circuit cases, and respondent's attempt to distinguish this case is unavailing.

Respondent refers to

> "The evidence concerning the very thorough check-out conducted by plaintiff's employees, the manner in which the ideas for feature stories originated, how they were assembled, assigned, subsequently re-written in certain instances, and eventually editored [sic] by the desk man for final publication. . . ."

to support its contention that its articles referring to Hollywood personalities contain the originality required under the copyright law. (Br. 7) What it fails to point out is that this volume of evidence to which it refers is nothing more than the unsupported, self-serving statements of its employees, not relied upon by the court. Again, the manuscripts, which are the best evidence of the things done to prepare the stories for publication, have been destroyed by respondent so that the actual

work done on these articles cannot be established. In contrast, petitioner introduced its manuscripts so the court could ascertain the work it had done in preparing its stories for publication.

Petitioner is loathe to argue evidence in this Court, but the misstatements of respondent, in the guise of corrections, leaves it no choice. Respondent accuses petitioner of stating that every author stated that he had sold to respondent no more than one-time rights in the story. This is not what petitioner said. In any event, the evidence introduced by petitioner as to each article is summarized as follows:

Article	Type of evidence	Substance of evidence	App. page
Mayfield	letter from author	Author had never sold all rights to the plaintiff, but only one time usage.	144
Marx	letter from syndicator	Text of the article came from Australia and syndicator had right to sell.	137
Mason	letter from syndicator	Syndicator had been given right to syndicate this article by the author.	137
Hermit	letter from author; and offer of proof as to author's testimony	He had sold only first rights to this story to plaintiff.	74, 152
Raft	letter from syndicator	Text of article came from Australia and syndicator had right to sell it.	134
Jailhouse Romance	offer of proof as to testimony of author	He sold only first rights to plaintiff.	74
Gas Station Marriage	letter from author; offer of proof as to author's testimony; letter from syndicator	He sold only first rights to plaintiff. Plaintiff purchased only one time usage.	74, 152 159
Wayne	letter from syndicator	Syndicator had been given the right to syndicate this article by the author.	143
Bee Stings	testimony of author and syndicator	Plaintiff had been sold one-time rights only.	89

Respondent states that three of the six articles were printed by petitioner after service of summons in this case. (Br. 3) Of course, since these three articles were not included in the original complaint, petitioner had no way of knowing that they had been previously printed by respondent. Besides, in each instance the authors assured petitioner of their right to sell the articles to it.

While the editor of the Insider did admit that he saw one of the articles in the Enquirer, he had been assured both orally and in writing by the author that only one-time usage had been sold to respondent. (Appendix 69) This fact points up the arguments in the Petition for Certiorari, that as a result of the spurious rule of law pronounced by the trial court, reliance by a publisher on assurances by the author that he has retained resale rights in his article will not protect him.

Respondent's characterization of the trial court's findings upon the issue of custom and usage is completely false. The trial court specifically held that petitioner's "evidence supports its contention that there is an established custom and usage that free lance authors selling to a tabloid sell only first rights." (Supp. App. 7) The court made no similar finding with respect to respondent's evidence on this point. The court did not declare respondent's evidence superior to petitioner's. The most that it did was summarize the testimony of one of respondent's "experts." (Supp.App. 11) In reaching its conclusion, the trial court then completely ignored the custom and usage evidence which it had accepted as true. (Supp. App. 13-14) Regardless of who had the burden of proving custom and usage, it is undisputed that petitioner did in fact carry the burden of proving the custom in the industry.

CONCLUSION

It is apparent from the Petition for Certiorari and the matters stated above that this case does indeed present unique and important issues of law in the copyright field, as well as important constitutional issues which will affect all authors and publishers. For these reasons, petitioner requests that this Court grant the petition for certiorari.

Respectfully submitted,

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Attorney for Petitioner.